Supreme Court, U.S.
FILED
MAR 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1912

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MIMI MARR,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On Appeal from the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI - CRIMINAL CASE

Mimi Marr, Pro Se
c/o M. William Nelson, Esq.
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Questions Presented

I.

Did the Court of Appeals err in failing to reverse the trial court for overruling Appellant's requested instruction?

II.

Did The Court of Appeals err in holding that the trial court's charge was not fundamentally erroneous?

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PETITION FOR WRIT OF CERTIORARI - CRIMINAL CASE

Opinion Below

The opinion of the Texas Court of Criminal Appeals below was not reported, as the Texas Court of Criminal Appeals refused Appellant's Petition for Discretionary Review.

Jurisdiction

The judgment of the Court below (Appendix A, infra, p. 31) was entered on January 29, 1986. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1257(3).

Constitutional Provision and Statutes Involved

1. The Fourteenth Amendment, United States Constitution, which provides:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The statute under which Petitioner was prosecuted, though nothing turns on its terms, was TEX. PENAL CODE ANN. Sec. 31.03 (a) (Vernon Supp. 1983), which provides as follows:

"Sec. 31.03. Theft

"(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property."

3. The statute under which Petitioner was prosecuted was TEX. PENAL CODE ANN. Sec. 31.01 (5)(B) (Vernon Supp. 1983), which provides as follows:

"Sec. 31.01. Definitions

"In this chapter:

"(5) 'Appropriate' means:

(A) to bring about a transfer or purported transfer of title to or other non-possessory interest in property, whether to the actor or another; or

(B) to acquire or otherwise exercise control over property other than real property."

4. The statute under which Petitioner sought post conviction relief was TEX. CODE CRIM. PROC. ANN. Art. 44.45 (b)(1) (Vernon Supp. 1984), which provides as follows:

> "Art. 44.45. Review by Court of Criminal Appeals
>
> "(b) The Court of Criminal Appeals may review decisions of the court of appeals upon a petition for review.
> "(1) The state or a defendant in a case may petition the Court of Criminal Appeals for review of the decision of a court of appeals in that case."

Statement of the Case

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Course of proceedings in the case now before this Court.

Appellant was initially indicted for the offense of theft of property of a value of not less than $750.00 nor more than $20,000.00 in violation of TEX. PENAL CODE ANN. Sec. 31.03 (Vernon Supp. 1983). In that instrument, it was alleged that Appellant committed the offense on February 24, 1984 against the property of Kim Cofer. Appellant entered a plea of not guilty to the charge. A trial thereafter was conducted before the jury, and upon the evidence, the charge, and the arguments of counsel, the jury returned a verdict finding Appellant guilty of the

offense alleged. Thereafter, punishment was assessed by the trial court of confinement in the Texas Department of Corrections for two years, but said sentence was probated and suspended by the trial court for a like period of time. Timely notice of appeal was given.

On March 7, 1985, this cause was heard by the Court of Appeals for the Tenth Supreme Judicial District of Texas, on the transcript of the record of the Court below, and it was the opinion of that court that there was no error in the judgment.

On April 23, 1985, Appellant filed her Petition for Discretionary Review with the Texas Court of Criminal Appeals.

On January 29, 1986, Appellant's Petition for Discretionary Review was refused.

B. Relevant facts concerning the underlying conviction for theft.

Appellant was indicted by the State for committing the offense of theft by appropriating property in violation of TEX. PENAL CODE ANN. Sec. 31.01 (5) (B) (Vernon Supp. 1983). At the conclusion of the evidence, the trial court prepared and subsequently delivered its written charge to the jury. In those instructions, the trial court provided the jury with the legal definition of "appropriate" as contained in TEX. PENAL CODE ANN. Sec. 31.01 (5) (A) and (B) (Vernon Supp. 1983). However, when the trial court delivered to the jury its application paragraph, the trial court utilized the general term "appropriate"

rather than the specific form or "appropriation" as previously alleged in the indictment.

At the conclusion of the evidence, Appellant submitted to the trial court a requested instruction supporting Appellant's trial theory that there was no criminal intent on her part in the taking of the property from the Complainant but that such was in fact simply a civil dispute as to the contractual rights of the parties as landlord and tenant. The trial court denied the requested instruction.

On appeal, Appellant attacked the charge of the trial court as fundamentally erroneous as it authorized conviction of the Appellant on both a theory alleged in the indictment and on one or more theories not alleged in the indictment. The Appellant also challenged the trial court's

denial of Appellant's requested instruction.

The Court of Appeals held that the trial court's charge, with regard to the application paragraph, was not fundamentally erroneous due to the language of the indictment. The Court of Appeals declined to rule on the merit of the Appellant's second alleged error by the trial court with regard to Appellant's requested instruction. The Court of Appeals then affirmed the trial court's conviction and sentencing.

Existence of Jurisdiction Below

The Texas Court of Criminal Appeals' decision is subject to review by this Court because the Court of Criminal Appeals has refused to review an important question of state and federal law. The decision of

the Court of Appeals left standing is in conflict with prior decisions of the Texas Court of Criminal Appeals and the Supreme Court of the United States. In addition, the decision left standing of the Court of Appeals sanctions a departure from the accepted and usual course of judicial proceedings by the trial court. A substantial federal question is presented to this Court for consideration; that being whether the Appellant's entry and seizure of a tenant's property pursuant to a contractual landlord's lien, as recognized by Texas law, does constitute a criminal action for theft, and whether the refusal of the Appellant's requested instruction, or the fact that the Appellant was tried in a criminal court rather than a civil court is a denial of due process under the Fourteenth Amendment.

The Texas Court of Criminal Appeals erred in failing to reverse the trial court for denying the Appellant's requested instruction.

The Texas Court of Criminal Appeals erred in failing to reverse the Court of Appeals' holding that the trial court's charge was not fundamentally erroneous.

Appellant respectfully urges that the decisions of the Courts below are improper in the following respects:

A. The Court of Appeals erred in failing to reverse the trial court for overruling Appellant's requested instruction.

During the trial it developed that the dispute between the parties was based upon differing interpretation of a rental contract. The Complainant had previously entered into a written lease contract with

the prior owners of the Westridge Apartments in Corsicana, Texas. Subsequent to the expiration of that lease, the Appellant became the owner of the apartment complex. Thereafter, according to the terms of the written lease, the Complainant was permitted to remain on the premises on a month-to-month basis, and all terms and conditions of the lease were continued. It was Appellant's belief, as testified to at the trial, that when the Complainants indicated their intent to vacate the premises without properly giving thirty days' written notice, she had the right to execute a landlord's lien to secure her rights under the rental contract. Thus, the Appellant admitted to all aspects of the offense alleged other than that of criminal intent. It was her position at trial that she was entitled under her lease contract to

secure the property to assure herself of her monetary rights under the month-to-month lease agreement. Furthermore, Texas law specifically authorized her to execute her contractual landlord's lien on all non-exempt property of the Complainants located in their apartment at the Westridge Apartments in Corsicana, Texas. TEX. REV. CIV. STAT. ANN. Art. 54.041, et seq. (Vernon 1984).

In light of the Appellant's trial theory, Appellant submitted to the jury the following requested instruction at the conclusion of the evidence:

> "You are instructed and if you believe that at the time the accused took the property there was a reasonable belief that said property was available for the taking pursuant to the rental contract signed by

> Tim and Kim Cofer, or if you have a reasonable doubt thereof, you will acquit the accused."

This instruction would have presented to the jury Appellant's theory that there was no criminal intent on her part in the taking of the property but that such was in fact a civil dispute as to the contractual rights of the parties as to Appellant's right to obtain and maintain control of that property until all such civil disputes were settled. The trial court denied the requested instruction.

It has long been the law in the State of Texas that civil disputes should not be settled in a criminal court. In fact, Texas law specifically provides for civil penalties of a landlord who willfully violates the Texas law which authorized the execution of and levy under a

landlord's lien. TEX. REV. CIV. STAT. ANN. Art. 54.045 (Vernon 1984). By including this provision in the Texas law authorizing liens such as that executed by the Appellant on the Complainants' non-exempt property, the Texas Legislature envisioned that disputes such as the one in this case would be resolved in civil court, not criminal court.

In the pending cause, the Appellant testified and presented documentation in support of her theory that she acted in this cause under the reasonable and honest belief that she had a legal right to seize the property to secure her interests as provided in the contractual agreement between the Complainants and her. This defensive testimony negated the issue of criminal intent. In such a situation, she was entitled to a charge that if, even though she had no title or color of title to the

property because of a misunderstanding as to the contractual rights, and yet reasonably believed that she had the right to take it under this contractual situation, she would not be guilty of the offense of theft. Burnaman v. State, 94 S.W.2d 751 (Tex. Crim. App. 1936). The evidence in the pending cause fully established the Appellant's lack of criminal intent with regard to the taking of the property. Having raised the issue and properly presented the trial court with a requested instruction, the trial court committed error in failing to respond and include this defensive issue before the jury. The Appellant was effectively denied due process, since the jury was prohibited from considering her defensive position with regard to the taking of the property. In a judicial context, due process requires a proceeding adapted to the nature of the

case. Ex parte Sturdivant, 551 S.W.2d 144 (Tex. Civ. App.-Texarkana 1977). The charge as delivered by the trial court was harmful and detrimental to the Appellant. The trial court erred in denying Appellant's request for jury instruction on the foregoing issue. The Court of Appeals erred in failing to consider this ground of error of the Appellant. For the foregoing reasons, the pending cause should be reversed or a least remanded to the trial court for a new trial.

The Court of Criminal Appeals erred in failing to reverse the Court of Appeals holding that the trial court's charge was not fundamentally erroneous.

B. The Court of Appeals erred in holding that the trial court's charge was not fundamentally erroneous.

Appellant was initially indicted for the felony offense of theft as made penal by TEX. PENAL CODE ANN. Sec. 31.03 (Vernon Supp. 1983). That indictment, in its pertinent portions, reads as follows:

> "(T)hat Mimi Marr... on or about the 24th day of February, 1984...did then and there intentionally, knowingly and unlawfully appropriate by acquiring and otherwise exercising control over property other than real property, to-wit: one 4-piece table set, one 6-shelf wood and glass etagere, 11 cushions, 1 dresser mirror, 1 Sound Design stereo with 2 speakers, and one stereo table, of a value of more than seven hundred fifty dollars and less than twenty thousand dollars, from Kim Cofer without the effective

> consent of Kim Cofer, the owner thereof and with intent to deprive said owner of said property..."

This indictment contains all of the necessary allegations of the offense of theft.

One of the elements of the offense of theft is that the accused "appropriates" property. This phrase is defined in TEX. PENAL CODE ANN. Sec. 31.01(5) in the following language:

> "(A) to bring about a transfer or purported transfer of title to or other non-possessory interest in property, whether to the actor or another; or
>
> "(B) to acquire or otherwise exercise control over property other than real property."

When these definitions are compared to the allegations contained in the indictment, it is apparent that the State chose to specifically allege that the appropriation that occurred in the pending cause was "by acquiring and otherwise exercising control over property other than real property." Thus, the State chose to indict the Appellant for committing the offense of theft by appropriating property in violation of TEX. PENAL CODE ANN. Sec. 31.01 (5) (B) rather than TEX. PENAL CODE ANN. Sec. 31.01 (5) (A). At the trial the State introduced evidence that, if believed by the jury, would have supported a finding that Appellant acted in the manner alleged.

At the conclusion of the evidence, the trial court prepared and subsequently delivered its written charge to the jury. In

those instructions, the trial court provided the jury with certain definitions of terms applicable to the offense of theft. More specifically, the trial court provided the jury with the legal definition of "appropriate" as contained in TEX. PENAL CODE ANN. Sec. 31.01 (5) (A) and (B) (Vernon Supp. 1983).

Thereafter, the trial court delivered to the jury its application paragraph. That portion of the charge reads as follows:

> "Therefore, if you believe from the evidence beyond a reasonable doubt that Kim Cofer was the owner of property, to-wit: 1 4-piece table set, 1 6-shelf wood and glass etagere, 11 cushions, 1 dresser mirror, 1 Sound Design stereo with 2 speakers and 1 stereo table, of a value of more than seven hundred fifty dollars

> and less than twenty thousand dollars and that the Defendant, Mimi Marr did, in Navarro County, Texas, on or about the 24th day of February, 1984 appropriate said property without the effective consent of said Kim Cofer, and with intent to deprive said owner of said property you will find the Defendant guilty."

It must be noted that in this portion of the charge, the trial court utilized the gerneral term "appropriate" rather than the specific form of "appropriation" as previously alleged in the indictment. In this manner, the charge of the trial court became fundamentally erroneous.

A charge of the trial court is fundamentally erroneous if it authorizes conviction on a theory alleged in the

indictment and on one or more other theories not alleged in the indictment. Cumbie v. State, 578 S.W.2d 732 (Tex. Crim. App. 1979). Such a charge is erroneous because it permits conviction on proof different from that required to be proved by the allegations in the indictment. On numerous occasions the Court of Criminal Appeals has reversed convictions where the charge has expanded the accused's liability beyond the allegations of the indictment. See Antunez v. State, 647 S.W.2d 649 (Tex. Crim. App. 1983); Ivory v. State, 632 S.W.2d 614 (Tex. Crim. App.1982); Dukes v. State, 610 S.W.2d 500 (Tex. Crim. App. 1981); Morris v. State, 609 S.W.2d 782 (Tex. Crim. App. 1980); Lampkin v. State, 607 S.W.2d 550 (Tex. Crim. App. 1980); Stone v. State, 599 S.W.2d 830 (Tex. Crim. App. 1980); Brown v. State, 595 S.W.2d 550 (Tex. Crim. App.

1980); Thompson v. State, 577 S.W.2d 497 (Tex. Crim. App. 1979); Garcia v. State, 574 S.W.2d 133 (Tex. Crim. App. 1978); and Morter v. State, 551 S.W.2d 715 (Tex. Crim. App. 1977).

In the pending cause, the indictment alleged theft by appropriation, but, more specifically, that such appropriation was accomplished by acquiring or otherwise exercising control over property other than real property as made penal by TEX. PENAL CODE ANN. Sec. 31.01 (5) (B) (Vernon Supp. 1983). However, when the trial court instructed the jury on this issue, it provided the jury with a complete legal definition of the term "appropriate." Thus, the jury was instructed that "appropriate" meant those definitions of this legal phrase. TEX. PENAL CODE ANN. Sec. 31.01 (5) (A) and (B) (Vernon Supp.

1983). Thereafter, when the trial court delivered its application paragraph, it utilized only the general phrase "appropriate." The jury, therefore, must necessarily have referred back to the general definition as provided by the trial court previously in the charge. As such, the jury was instructed that it could convict the Appellant for appropriating the property under either of the two definitions. Since the jury was not restricted to the allegations in the indictment, the charge authorized conviction for a theory contained in the indictment and for a theory not contained in the indictment. Such a charge is patently erroneous. Cf. Sandig v.State, 580 S.W.2d 584 (Tex. Crim App. 1979).

Appellant has previously cited this Honorable Court to numerous decisions of the Texas Court of Criminal Appeals

wherein it has been held that a charge which enlarges upon the allegations of the indictment is fundamentally defective. However, no case specifically dealing with the issue of "appropriate" has bee found by Appellant in this regard. The only case wich relates to this issue is Jackson v. State, 571 S.W. 2d 1 (Tex. Crim. App. 1978). In that case, as in the pending cause, the indictment alleged theft by appropriation by exercising control over property other than real property without the owner's effective consent. The jury charge subsequently provided the jury with a single definition of the legal phrase "appropriate." The Court of Criminal Appeals held that the jury instruction was not fundamentally defective as an enlargement upon the allegations in the indictment since the definition of "appropriate" in the jury charge restricted

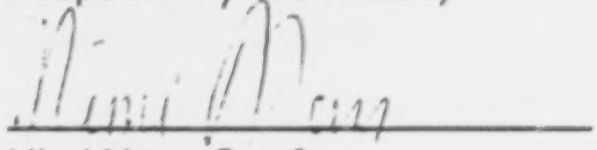
its use to the means alleged in the indictment. If this case is compared to the pending cause, it is apparent that a different situation occurred. The indictment specifically alleged a manner of appropriation. The charge presented by definition two methods of appropriation. Subsequently, the trial court utilized the general phrase "appropriate" in its application paragraph, thus failing to restrict the jury's consideration to the allegations in the indictment. The charge, therefore, was fundamentally erroneous.

Conclusion

The judgment below is a unique departure from decisions of the courts below, as well as this Court. As such, it represents a denial of due process under the Fourteenth Amendment to the

Constitution and the decisions of this Court which were designed to protect a citizen from being criminally prosecuted and convicted for a statutory civil matter.

Respectfully submitted,



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Certificate of Service

This is to certify that the above and foregoing Appellant's Petition for Writ of Certiorari - Criminal Case has been served on Patrick C. Batchelor, District Attorney of Navarro County, Texas, by delivery of a true copy to him by certified mail on the 31st day of March, 1986.

Mimi Marr

Appendix A

Judgment of the Court below entered on January 29, 1986:

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
150 Years of Independence
1836-1986

E: Case [redacted]-0510-85
TYLE: Mari[redacted]

AUSTIN JAN 29 '86 TEX

US POSTAGE 0.14

January 29, 1986

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

DA#: 10-84-00145-CR

Thomas Lowe, Clerk

URT OF CRIMINAL APPEALS
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